ABSTRACTS OF RECENT DECISIONS.

AGENCY.

Interest is not coupled with the agent's authority, so as to prevent revocation of the power, where the agency is to loan money for the principal and collect the interest on the loans, for an annual commission on the existing amount of the loans, to be deducted from the interest as collected: *Oregon & W. M. S. Bank* v. *American Mtge. Co.*, U. S. Circ. Ct. Dist. Oregon, May 7, 1888.

BANKRUPTCY.

Sale of real estate by assignee in bankruptcy, under the United States Bankruptcy Act, must be made in pursuance of an order of the Bankrupt Court, in order to discharge incumbrances; without such order the assignee sells subject to incumbrances, and a purchaser gets no better title than the bankrupt had: *Lee* v. *Rogers*, S. Ct. App. W. Va., Sept. 15, 1888.

BANKS AND BANKING.

Check deposited for collection imposes upon a bank the obligation to return either the check or the money; so, if the collecting bank surrenders the check to the bank upon which it is drawn, and accepts a cashier's check in lieu thereof, its liability to its depositor is fixed as much as if it had received the cash: *Fifth National Bank of Pittsburgh* v. *Ashworth*, S. Ct. Pa., Jan. 7, 1889.

Deposit in bank may be applied to the payment of the depositor's paper held by the bank for collection, even when the former, after the deposit of the money, has made a voluntary assignment for the benefit of creditors: *Farmers' Deposit Nat. Bank* v. *Penn Bank, for use, etc.*, S. Ct. Pa., Jan. 7, 1889.

National Bank, deducting usurious interest from the face of a note discounted, can recover only the face of the note, less the interest deducted; if the borrower pays the usurious interest in advance, he is entitled to recover double the interest so paid: *Schuyler National Bank* v. *Bollong*, S. Ct. Neb., Nov. 21, 1888.

BILLS AND NOTES.

Consideration is imported by a promissory note, and the burden of proof is upon the party alleging the contrary: *Flint* v. *Phipps*, S. Ct. Or., July 2, 1888.

Failure of consideration may be alleged as a defence to a promissory note given as a retainer to attorneys in a prosecution against the maker for homicide, when, after the note was given and before trial, the maker was killed by a mob: *Agnew* v. *Waldon*, S. Ct. Ala., July 12, 1888.

Joint makers of a promissory note may show by parol evidence that one of them is the principal debtor, and the others are his sureties: *First Nat. Bank of Covington* v. *Gaines*, Ct. App. Ky., Oct. 13, 1888.

Notice of protest is insufficient, where the notary who protests a note, which has been discounted by a bank, makes inquiry only of the receiving teller of the bank as to the indorser's residence, and, not receiving the desired information, mails the notice without further inquiry to the indorser at the place where the note bears date. *Sweet* v. *Powers*, S. Ct. Mich., Nov. 1, 1888.

Parol evidence that a note was indorsed at the request of the payee, who promised that the indorser should not be held upon the note, and that he would look to the maker alone for payment, is admissible to show want of consideration: *Kulenkamp* v. *Groff*, S. Ct. Mich., Oct. 19, 1888.

Parol evidence is inadmissible to show that, when certain promissory notes were made, there was an oral agreement between the parties that, if the maker should be forced to make an assignment for the benefit of creditors, the payee should file his claim with the assignee, and execute a full release of all claims upon the notes beyond the amount which might be paid under the assignment: *Harrison* v. *Morrison*, S. Ct. Minn., Nov. 2, 1888.

Presentment for payment to maker of a note will be excused, where the note was made in Minneapolis, Minnesota, no place of payment being fixed, the payee then residing in that city and the maker in Wisconsin; the payee indorsed the note to a third party, who knew that the maker resided in Wisconsin; but subsequently the maker, without the knowledge of the holder, removed to Minneapolis, where he resided at the time the note fell due: *Salisbury* v. *Bartleson*, S. Ct. Minn., Nov. 12, 1888.

Second indorser, who writes his name before, instead of after, that of a prior indorser, cannot recover from the latter the amount paid in taking up the note after dishonor: *Sweet* v. *Powers*, S. Ct. Mich., 471.

Citizenship.

Birth in the United States from Chinese parents, not engaged in any diplomatic or official capacity under the emperor of China, makes the child a citizen of the United States, and this *status* cannot be changed by the father during the child's minority; the child must have arrived at maturity, and the United States consented, before citizenship can be lost: *Ex parte Chin King*, U. S. Circ. Ct. Dist. Oregon, June 25, 1888.

Constitutional Law.

All crimes for which trial by jury is provided in Art. III. Const. U. S. are not merely felonies or offences punishable by confinement in the penitentiary, but as well some classes of misdemeanors, the

punishment of which involves, or may involve, the deprivation of liberty of the citizen: *Callan* v. *Wilson*, S. Ct. U. S., May 14, 1888.

Sixth Amendment to Const. U. S. does not supplant that part of Art. III. Const. U. S., relating to trial by jury, so as to permit Congress to declare in what way other than by jury persons should be tried, when accused of crime on the high seas, and in the District of Columbia, and in places ceded for the seat of government, forts, magazines, arsenals, and dockyards: Id.

Corporations.

President of corporation made a promissory note to his own order, indorsed it, had it discounted, and used the proceeds for the corporation's benefit; in a suit upon the note by the administratrix of the president, who had taken it up at maturity, the corporation having retained the benefit of the transaction, was estopped from denying the authority of the president to execute the note: *Tuscaloosa Cotton-Seed Oil Co.* v. *Perry*, S. Ct. Ala., June 27, 1888.

Subscription to stock of one corporation by another, unless expressly authorized by statute, is *ultra vires* and void: *Valley R. W. Co.* v. *Lake Erie Iron Co.*, S. Ct. Ohio, Oct. 16, 1888.

Criminal Law.

Reversal of conviction for crime and the awarding of a new trial, upon appeal by defendant, will not bar further prosecution on the same charge, though defendant in his appeal did not ask for a new trial, but only for a reversal and his discharge from imprisonment: *People* v. *Travers*, S. Ct. Cal., Sept. 28, 1888.

Damages.

False and fraudulent representation by the agent of a railroad company that the physician of a person, who had been injured through the company's negligence, had stated that her injuries would soon be cured with proper treatment, by reason of which representation she was induced to sign a release of her claim for damages, is sufficient ground for the rescission of the release, notwithstanding the fact that she may have entertained doubts as to the correctness of the alleged opinion of the physician: *Peterson* v. *Chicago, M. & St. P. Ry. Co.*, S. Ct. Minn., June 12, 1888.

Recovery cannot be had against a railroad company for cutting across a ditch embankment in the construction of its line and thereby draining more surface water into the ditch than it could hold and flooding the adjoining land, the owner of the land having already received damages for the taking of the land where the road was constructed, including "the legal incidental damages to the land not taken": *Bell's Ex'rs* v. *Norfolk S. R. Co.*, S. Ct. N. C., Oct. 8, 1888.

Elections.

Rejection of returns from certain townships by a board of canvassers, whose action is conclusive upon no one, is immaterial to the determination of an issue to test the rights to the office in question: *Gatling* v. *Boone*, S. Ct. N. C., Oct. 8, 1888.

Evidence.

Certified copy of deed for lands in Georgia, though authenticated as required by Act of Congress, is not admissible in evidence in Alabama, without proof of the loss or destruction of the original, as under the statutes of Georgia it would not be admissible in that State without such proof: *Whann* v. *Atkinson*, S. Ct. Ala., July 16, 1888.

Hypothetical questions to medical experts may assume any state of facts which there is evidence tending to prove; in such a question, embodying a patient's assumed symptoms and condition, the expert may be asked what, in his judgment, is the probability of recovery: *Peterson* v. *Chicago M. & St. P. Ry. Co.*, S. Ct. Minn., June 12, 1888.

On cross-examination of a witness he was asked, in language hardly proper, whether his testimony was not false, and resented the question; he was then asked whether certain statements made by him were not without foundation in fact; the Court, in the exercise of its authority to prevent unseemly scenes between counsel and witness, properly sustained an objection to the latter question and stopped the course of the examination: *Baldwin* v. *St. Louis K. & N. W. Ry. Co.*, S. Ct. Iowa, Oct. 2, 1888.

Fire Insurance.

Additional insurance was procured by the insured on the representation of an agent that it would be all right—the original policy providing that, if the insurer should procure such additional insurance without the consent of the company, the policy should be void, and that the agent had no authority to modify any of its conditions. The company was not estopped from denying liability, although the insured had never seen the policy, and although the agent had authority in a certain way to consent to additional insurance, and had done so in other cases, but had not consented in this instance in the manner prescribed by the policy: *Cleaver* v. *Traders' Ins. Co.*, S. Ct. Mich., Oct. 5, 1888.

Waiver of condition of policy, where there is evidence from which it may be found, is a question for the jury. Id.

Husband and Wife.

Claim for services by a woman who married a man, supposing him to be unmarried, and lived with him as his wife until his death, but who learned afterwards that he had a former wife living, and not

divorced, at the time of the marriage, cannot be sustained against his administrator: *Cooper* v. *Cooper*, S. Jud. Ct. Mass., Sept. 5, 1888.

Interstate Commerce Law.

Car properly adapted to carry the quantity designated should be furnished by the carrier, when a carload lot in weight or quantity is defined and a rate designated: the shipper cannot lawfully be required to go to any expense in fitting up the car: *Rice et al.* v. *W. N. Y. & Pa. R. R. Co.* The Commission, December 3, 1888.

Interchange of traffic, through the customary reasonable and equal facilities, cannot be denied by one railroad to another on the ground that the latter supplies no public necessity: all railroads authorized by competent public authority must be conclusively presumed to be conveniences: *Ky. & Ind. B. Co.* v. *L. & N. R. R. Co.* The Commission, August 2, 1888.

Reasonableness and justice of rates must be determined not alone by the exigencies of the complainant's business, but with due regard for the circumstances of the carrier as well. The rate challenged may be high for the distance hauled, if that only be regarded, but it is not a violation of the law for the carrier to accept a less division of a through rate for traffic going over its road than the charges to the stations it serves; the circumstances and conditions are substantially different and the service entirely dissimilar: *Rice et al.* v. *W. N. Y. & Pa. R. R. Co.* The Commission, December 3, 1888.

Judgments.

Assignment of judgment in action of tort cannot be made before the judgment has been actually entered, even though a verdict has been rendered upon which judgment may be, and is afterwards signed: *Gamble* v. *Central R. & Banking Co.*, S. Ct. Ga., July 11, 1888.

Jurisdiction.

Forgery by officers of a national bank who, with intent to deceive the United States bank examiner, forge a promissory note and enter it upon the books of the bank as assets, may be tried in the State Courts, notwithstanding the fact that the Federal Courts have exclusive jurisdiction to determine the falsity of the entries: *State* v. *White*, S. Ct. N. C., Nov. 5, 1888.

State Courts may entertain jurisdiction of suits brought against national banks under sections 5197 and 5198 of the Revised Statutes of the United States, to recover the penalty for charging usurious interest: *Schuyler National Bank* v. *Bollong*, S. Ct. Neb., Nov. 21, 1888.

Libel.

Pleadings addressed to and filed in a Court of competent jurisdiction, which are pertinent and material to the relief sought, whether

legally sufficient to obtain it or not, are absolutely privileged, and, however false and malicious, are not libellous: *Wilson* v. *Sullivan*, S. Ct. Ga., May 23, 1888.

Life Insurance.

By-law of mutual benefit society, which conflicts with the terms of the policy, the society having power under its charter to issue such a policy, will be construed to have been waived in favor of the assured, and the provisions of the policy will determine the right of the parties, notwithstanding the by-law: *Davidson* v. *Old People's Mut. Ben. Soc.*, S. Ct. Minn., Oct. 16, 1888.

Drunkenness cannot be set up as a defence by a mutual benefit association which issued a certificate, containing a provision avoiding it, if the assured should use alcoholic stimulants to the injury of his health, to a person known to its agent to be a confirmed drunkard: *Newman* v. *Covenant Mut. Ben. Assn.*, S. Ct. Iowa, Oct. 26, 1888.

Limitation.

Acknowledgment sufficient to remove the bar of the statute from a particular note, is not shown by a letter which, after alluding to "those old notes," concluded, "I have no money now, but you shall have every cent that is due on them:" *Stout* v. *Marshall*, S. Ct. Iowa, Oct. 13, 1888.

Indorsement on note made and signed by debtor, after it has become barred by limitation, in these words, "I hereby acknowledge the indebtedness of this note," takes the note out of the operation of the statute: *Drake* v. *Sigafoos*, S. Ct. Minn., Nov. 12, 1888.

Government suits to revoke land patents for fraud and misrepresentation may be met by pleas of the Statute of Limitations and laches, when the United States is only a nominal plaintiff, did not own the lands, has no real interest in the controversy, and is prosecuting the actions for the sole benefit of private persons: *U. S.* v. *Beebe*, S. Ct., U. S., April 30, 1888.

Running of statute in favor of bailee does not begin until he denies the bailment and converts the property: *Reizenstein* v. *Marquardt*, S. Ct. Iowa, Oct. 2, 1888.

Master and Servant.

Door boy, employed in coal-mine, whose duty was at a given signal to open and shut the door through which cars passed into and out of the mine, was killed by several loose cars starting of their own accord, without warning or signal, by reason of their brakes being defective; at the time but one brakeman, or "spragger," instead of two, as was customary, was in charge of the cars: no contributory negligence being shown, the employer was liable: *Southwest Va. Imp. Co.* v. *Smith's Admr.*, S. Ct. App. Va., Aug. 23, 1888.

NEGLIGENCE.

Contributory negligence is chargeable to a boy of ten and a half years and of average intelligence, who had been frequently in the vicinity of a railway turn-table, had a general knowledge of its structure and operation, had been repeatedly warned by his father that it was dangerous to play upon it and told not to do so, and who knew that the railroad company prohibited children from going upon the turn-table, but who, nevertheless, went upon it, and played there with other boys, and was in consequence injured: *Twist* v. *Winona and St. P. R. R. Co.*, S. Ct. Minn., Aug. 30, 1888.

Contributory negligence will not be imputed, as matter of law, to a person injured after dark by a defect in a street, although he knew that such defect existed, but not that it was dangerous; the question is for the jury: *City of Richmond* v. *Mulholland*, S. Ct. Ill., Nov. 26, 1888.

County agricultural society, which has constructed seats on its fair-ground for the use of its patrons, is liable in its corporate capacity to an action for damages by a person who, while attending a fair held by it, and rightfully occupying the seats, sustains an injury by reason of the negligent construction of such seats: *Dunn* v. *Brown Co. Agricultural Society*, S. Ct. Ohio, Nov. 13, 1888.

Ordinary care must have been exercised by one who has been injured by the negligent operation of a machine by another, in order to entitle him to recover for the injuries sustained, even though there has been gross negligence on the part of the person causing the injury: *Willard* v. *Swanson*, S. Ct. Ill., Nov. 15, 1888.

Vicious animal, permitted by its owner to run at large, while trespassing in company with stock belonging to another person upon uninclosed land owned by neither, killed one of the latter's colts; the owner of the colt was entitled to recover its value, notwithstanding the fact that it was also technically trespassing upon the land of another person: *Hill* v. *Applegate*, S. Ct. Kan., Oct. 6, 1888.

PRIVILEGE.

Service of summons cannot be made upon a person attending the hearing of an application for an injunction in a case in which he is interested as a party, in a county other than that of his residence, while he is going to, attending, or returning from such hearing: *Andrews* v. *Lembeck*, S. Ct. Ohio, Oct. 16, 1888.

PUBLIC OFFICERS.

County treasurer cannot be required by *mandamus* to pay over to a railway company funds received by his predecessor for the benefit of the company and transferred by him to the county fund, in the absence of proof that the money was ever transferred to the former, or was actually or presumptively in his possession: *Minneapolis and St. L. Ry. Co.* v. *Becket*, S. Ct. Iowa, Sept. 8, 1888.

Fish inspector of a city, whose duty it is to inspect all fish offered for sale, and destroy such as are unwholesome and unfit to be eaten, has judicial duties and powers, and, while acting within his jurisdiction, is not liable for the careless, improper, or erroneous performance of his duties, although he knew his unfitness for the position: *Fath* v. *Koeppel*, S. Ct. Wis., Oct. 9, 1888.

Railroads.

Brakeman on freight train, in going between two cars to make a coupling, was compelled to stoop in order to avoid the projecting lumber piled on one of the cars, and stumbled, fell, and was killed; although the car was improperly loaded, the brakeman might have observed the danger, and have rightfully refused to go between the cars, and therefore the company was not liable: *Brice* v. *Louisville and N. R. Co.*, Ct. App. Ky., Sept. 29, 1888.

Bridge, elevated four feet nine inches above the top of a freight car, on a part of the road where brakemen are required to pass over the top of cars in applying the brakes upon moving trains, not only in the daytime, but also when the night is dark and foggy, and it would be impossible to know of the proximity of the bridge, is not a risk ordinarily and naturally incident to the service, and the company maintaining it is guilty of negligence: *Louisville N. A. & C. R. R. Co.* v. *Wright*, S. Ct. Ind., June 20, 1888.

Engineer was sent by the railroad employing him with one of its engines to haul temporarily for another company trains of the latter over its track, and was injured by an accident resulting from the bad condition of the latter company's track; the employer company was not liable for such injury: *Dunlap* v. *Richmond and D. R. Co.*, S. Ct. Ga., July 11, 1888.

Fire, originating from sparks from a locomotive, destroyed hay stacked in a field beside the railroad; the railroad was liable for the damage, unless the jury found that the employés of the railroad who were in charge of the locomotive were competent and skilful, and that the locomotive itself was properly equipped and operated: *Bulliss* v. *Chicago M. & St. P. Ry. Co.*, S. Ct., Iowa, Sept. 8, 1888.

Wills.

Life estate only is given to a wife by a devise to her by her husband, who died childless, of his house and lot and "all the rest and residue" of his estate, "to have and to hold for and during the term of her natural life," although she is spoken of elsewhere in the will as the residuary legatee, and no disposition of the remainder is made: *Mixter* v. *Woodcock*, S. Jud. Ct. Mass., Nov. 27, 1888.

James C. Sellers.